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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1210

CIRILO FIGUEROA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of United States:

The Petitioner, Cirilo Figueroa, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above-entitled case on February 28, 1972.

A. The Opinion Below

There were two opinions by the trial judge, Honorable David N. Edelstein, who convicted the defendant, in a non-jury case, for violation of Title 21, Sections 173, 174, and Title 26, Sections 4705(a) United States Code. The first decision was filed on or about December 27th, 1971, and is printed herein as Appendix "A". The Second decision

was filed on or about January 27th, 1972, and is printed herein as Appendix "B". The Circuit Court of Appeals affirmed without opinion on February 28, 1972. The defendant has been incarcerated since his sentencing on January 24, 1972, and has not been released on bail.

B. Jurisdiction

The judgment of the Court of Appeals was entered on February 28, 1972. Petitioner Cirilo Figueroa is currently incarcerated, and the jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that the review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

1. When the Government deliberately fails to arraign a defendant is this undue delay prejudicial to his right to a fair trial?

2. Was Figueroa's speedy trial right under the United States Constitution violated when the Judge delayed his decision in a non-jury case for over sixty days?

3. Is the Ninth Circuit correct in *U. S.* v. *Stephens,* 449 F2d 103, or is the Second Circuit correct in *U.S.* v. *Fiotto* (docket No. 71–1651, not reported, decision dated January 24, 1972)?

4. Was Rule 23(c) of the Federal Rules of Criminal Procedure completely negated by the trial court?

5. Did the Judge violate Figueroa's constitutional rights pursuant to Rule 43?

6. Was Figueroa's possession sufficient to activate the statutory presumption?

D. United States Constitution and the Statutes

United States Code, Title 26, Section 4705(a).

Comprehensive Drug Abuse Prevention and Control Act of 1970, Section 404 (a, b).

United States Code, Title 21, Sections 812-844.

United States Code, Title 21, Sections 173, 174.

E. Summary Statement of Matters Involved

The above defendant-appellant, along with Manuel Chacon and others, was arrested in June, 1970, in the Southern District of New York. The other defendants were arrested in Chicago, Illinois.

Defendant Figueroa was released on $2,000.00 bail in July, 1970, for removal to the Northern District of Illinois. Pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, the case of Figueroa and Chacon was transferred to the Southern District of New York.

The file in this matter was docketed in the Southern District of New York, in December, 1970, and given Indictment Number 70 Cr. 1040. No judge was assigned and the case was not called for pleading until May 3, 1971. The defendant pleaded not guilty to the transferred indictment, and immediately moved to dismiss the indictment because

of the government's deliberate failure to prosecute.* This motion was denied by Judge Edelstein in June, 1971. It was then stated that the defendant would be afforded an "early trial". The defendant Chacon became a fugitive sometime between the transfer of the case from Chicago to New York and failed to appear on May 3, 1971. He remains a fugitive to this date as far as the record indicates.

On October 13, 1971, the case was scheduled for trial before Judge Edelstein. At that time the government filed superseding information, 71 Cr. 1167. All motions made pursuant to indictment 70 Cr. 1040 were deemed made on behalf of the defendant for the superseding indictment, and upon application of the defendant and without opposition of the government, Indictment Number 70 Cr. 1040 was dismissed as to defendant-appellant Cirilo Figueroa.

The Court was then advised that Figueroa was and has always sought a speedy trial in this matter (4 R).

The defendant waived a Jury and an interpreter was assigned.

Agent Dominic Petrosi, the main government witness, testified that he first met the defendant Figueroa on February 19, 1970, at about 2:30 P.M. That he was introduced to him by co-defendant Josende. That Petrosi and Josende did most of the talking (26-30 R). That at 5:45 P.M. Josende delivered to agent Petrosi a substantial amount of heroin and Agent Petrosi gave the money for this heroin to Josende (33 R). That Agent Petrosi testified as to certain conversations allegedly had between him and Figueroa, however

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* The Docket sheets received from Illinois indicate that a plea of not guilty was entered in that Court.

none of the conversations used the term narcotics or amounts of money (77 R), or methods of delivery. That the conversation between the agent and the defendant was less than a minute in duration (103 R), and the agent was unable to remember what words were in Spanish or in English (113 R). Figueroa only answered yes and I do (105 R). Agent Petrosi testified however that there were conversations between the defendant and co-defendants Josende and Chacon in Spanish which he did not understand (27 R).

On March 25th, 1970, at 4:00 in the afternoon Agent Petrosi again met the defendant Figueroa in the 005 Bar at Broadway and 162nd Street in Manhattan. That after a conversation with Figueroa, Petrosi, Figueroa and Agent Fullett proceeded to the El Brilliante Restaurant, and negotiations were continued.

At trial the government offered a napkin allegedly written by Figueroa with a dollar sign and amounts of money written thereon. That it was the agent's testimony after referring to this napkin (Government's Exhibit 1 for identification) that Figueroa negotiating for the narcotics used this napkin to explain his money situation (42-43 R).

At the time this exhibit was offered in evidence, the defendant Figueroa pleaded surprise, claiming that this should have been furnished him pursuant to Rule 16 of the Federal Rules of Criminal Procedure and that the defendant's memory was so dim by the lapse of time, that he was unable to find witnesses in his behalf to indicate whether or not he was in the restaurant or whether or not he wrote certain items on this napkin (44-45 R). The Judge required a memorandum of law on this particular subject, and after

filing a memorandum of law, the Judge admitted into evidence Government's Exhibit 1.

The conversation between Petrosi and overheard by Fullett was the heart of the government's case.

On the second conversation between the defendant and agents of the Bureau of Narcotics, certain words were attributed to the defendant. Shortly after the conversation with Figueroa, and the agents, they went to the apartment of co-defendant, Manuel Chacon. Figueroa was not present for all the conversations (102 R). Thereafter Josende delivered to the agents an amount of heroin which formed the basis for the prosecution under the Third and Fourth counts of the information. It is conceded at trial that Figueroa never had actual possession of the heroin delivered on February 19, or on March 25th. There is also no claim by the government that Figueroa had a personal knowledge that the heroin was illegally imported. The government relies on the fact that Figueroa was in constructive possession of the heroin and therefore activated the presumption against him. The Government also claims that he was an aider and abettor of Josende in failing to have an order form. The defendant's case consisted of the defendant who denied the transactions, claimed he had no independent recollection of any items written on the napkin, claimed he had a minimal understanding of English, and offered his background and character for the Court to appraise. The defendant offered four character witnesses, all of whom claimed the defendant was gainfully employed, had a good reputation for truth and veracity, and all claimed that he did not have command of the English language. Defendant also offered testimony of two secretaries,

Norma J. Quadarella, and Marie Clausi, who were employed by his attorney of record, who claimed that when Figueroa came to the attorney's office they had trouble understanding him and that on many occasions he came with another person who could speak English (182, 183-186, 189-190).

The trial lasted for about four hours on October 13th, and began on October 20th, at 2:00 P.M. and lasted for about two hours. On October 21st, the trial resumed, the government offered rebuttal testimony of Rodney J. Walker, an examiner of the Department of Highway Safety in Florida, and Agent O'Neill who arrested Figueroa in June of 1970. The government did not offer the original arrest interview sheet taken by the United States Attorney at the time of Figueroa's arrest, nor do they offer any receipts for money allegedly taken from Figueroa at the time of his arrest. After hearing the rebuttal testimony and summations the Court announced without request of either counsel that "the Court will reserve decision and would ask that each of you submit proposed Findings of Fact and Conclusions of Law keyed to the record" (292 R). Briefs were ordered to be submitted by both sides by October 27th, 1971, and were probably submitted on or about October 29th, 1971.

Neither the defendant nor the government allowed the Court any specific amount of time nor waived any time limit as to when the Court could file the findings of fact. The defendant was continued on bail, and on December 27th, 1971, the Court officially filed their Findings of Fact (Defendant's Exhibit in Appendix). Shortly thereafter a motion was made for an arrest of judgment declaring the Findings of Fact null and void as the Court had given up

jurisdiction. It was also alleged in the motion before Judge Edelstein that the decision was delayed so long that the defendant was deprived of a speedy trial, and/or speedy justice. The Court orally denied this motion on January 24th, 1972, the date the defendant was sentenced. An opinion was filed on January 26, 1972. An appeal was taken from all proceedings before Judge Edelstein, including the motions made on Indictment 70 Cr. 1040.

F. Reasons for Granting Writ

POINT I

This Court should determine whether or not an unexplained delay by the government creates insurmountable prejudice to a defendant, and should clarify the legal differences amongst the Circuits. In *Ross* v. *U.S.*, 349 F2d 210, the District of Columbia Circuit found the delay as fundamentally unfair to the defendant.

The Second Circuit Court of Appeals in *U.S.* v. *Rivera*, 346 F2d 942, and *U.S.* v. *Banks*, 370 F2d 141, is in conflict with the Ross decision.

POINT II

This court should grant a writ of certiorari to amplify its position in *Klopfer* v. *North Carolina*, 386 U.S. 215 and the Sixth Amendment of the United States Constitution.

The record in this case indicates that the defendant Figueroa sought to dismiss the indictment because of the government's "deliberate failure to prosecute" in May, 1971.

When the indictment was waived and an information filed, the transcript clearly indicated that the defendant has always sought a speedy trial (4 R). This court should grant certiorari to determine whether a Judge's decision which occurred over sixty (60) days after trial is consistent with the defendant's rights under *Klopfer Supra*, the Sixth Amendment of the Constitution, or the fundamental fairness doctrine of *Twining* v. *New Jersey*, 211 U.S. 78, cited by Justice Black in *Duncan* v. *Louisiana*, 391 U.S. 161.

POINT III

This court should grant certiorari to correct the conflict that exists between the Ninth Circuit Court of Appeals in *U.S.* v. *Stephens*, 449 F2d 103, and *U.S.* v. *Fiotto* (Second Circuit Docket No. 71–1651).

The Ninth Circuit held that a defendant convicted after May 1, 1971, could be sentenced under the amended narcotic laws, Title 21, Sections 812-844, instead of the antiquated mandatory sentence provisions as required under Title 21, Sections 173-174. The court in this case imposed upon defendant-appellant Figueroa a mandatory minimum sentence without specifying the number of years until it was called to the Judge's attention by defense counsel.

POINT IV

This Court should grant a writ of certiorari to determine whether or not a trial judge must file a general verdict within a reasonable period of time.

The 3rd Circuit in *U.S.* v. *Ginzburg*, 338 F2d 12 indicated that a general verdict should be promptly filed. Certiorari should be granted to clear up this conflict!

POINT V

This court should grant a writ of certiorari to determine whether or not the defendant must be present, even in a non-jury case, when a verdict is announced.

POINT VI

This Court should grant a writ of certiorari to determine whether or not certain words of the Defendant were sufficient to constitute "Constructive Possession" of narcotic drugs.

There must be proof that the defendant had the ability to deliver the narcotics in order to have been found in constructive possession. *U.S.* v. *Jones,* 308 F2d 26, and *U.S.* v. *Beigel,* 370 F2d 751.

CONCLUSION

In conclusion, the writ should be granted and the Court, in the exercise of its power, should order the judgment of conviction reversed.

Respectfully submitted,

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APPENDIX A

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OPINION #38137

Filed December 27, 1971

UNITED STATES OF AMERICA,

—v.—

CIRILO FIGUEROA,

Defendant.

EDELSTEIN, *Ch. J.*

Cirilo Figueroa was originally indicted in June, 1970, together with five co-defendants in the Northern District of Illinois, Eastern Division, and charged with the violation of various sections of the narcotics laws. Thereafter, pursuant to Rule 21 (b) of the Federal Rules of Criminal Procedure, the trial of defendants Figueroa and Mr. Francisco Manuel Chacon (presently a fugitive) was transferred to this court. On October 13, 1971, a four count superseding information was filed charging Figueroa as follows:

Count 1: Facilitating the transportation of about 500 grams of heroin on February 19, 1970. (Title 21, U.S.C., Sections 173, 174.)

Count 2: Transfer of about 500 grams of heroin on February 19, 1970, not in pursuance of a written order on a

form issued by the Secretary of the Treasury (Title 26, U.S.C., Sections 4705(a) and 7237(b)).

Count 3: Facilitating the transportation of about 500 grams of heroin on March 25, 1970 (Title 21, U.S.C., Sections 173, 174).

Count 4: Transfer of about 500 grams of cocaine on March 25, 1970, not in pursuance of a written order on a form issued by the Secretary of the Treasury (Title 26, Sections 4705(a) and 7237(b)).

Figueroa also was charged with aiding and abetting the commission of the substantive offenses (Title 18, Section 2).

The case was tried to the court on October 13, 20 and 21, 1971, after the defendant waived a trial by a jury. This court finds the defendant guilty on all four counts as charged. The court in arriving at its decision has carefully considered the testimony of witnesses and exhibits introduced into evidence, the extensive oral argument and proposed findings of fact and conclusions of law.

On February 19, 1970, Agents Dominic P. Petrossi, and Harry M. Fullett, members of the Chicago Regional Office of the Bureau of Narcotics and Dangerous Drugs, acting in an undercover capacity, accompanied Mr. Jose Josende from Chicago to New York to meet the defendant, Cirilio Figueroa. Jose Josende had previously sold heroin and cocaine to Petrossi in Chicago.

These agents secured a room in Queens County, New York, where Fullett remained while Petrossi and Josende continued into New York City to meet Figueroa.

At 163rd Street and Broadway, New York City, Josende entered a bar and placed a telephone call. Josende and

Petrossi then left the bar and proceeded to a nearby street corner where they met and conversed with a third individual, Mr. Manuel Chacon. At approximately 2:30 p.m. Chacon placed a telephone call. Shortly thereafter the defendant, Figueroa, arrived in a motor vehicle. Chacon entered the vehicle which then left the area. It returned shortly thereafter. Then Petrossi and Josende entered the car where Figueroa was introduced to the agent as "Lazaro." (R. 21)[1]

The vehicle, driven by Figueroa, circled the area and then finally parked. During this time Figueroa, Chacon, and Josende conducted a conversation in Spanish which Agent Petrossi could not understand.

Agent Petrossi interrupted the conversation to say that he was there to take care of business and return to Chicago. (R. 24) Figueroa then spoke directly to the agent in English, saying "I know you."

Thereafter Petrossi stated that the narcotics which he had purchased from Josende in Chicago had not been of satisfactory quality and that he, Petrossi, had asked to contact the New York source of Josende's drugs so that the source could guarantee the quality of drugs sold for Chicago distribution. (R. 24-28) Petrossi proposed a plan for future transactions whereby he would pay in advance for one-half of the narcotics purchased until Josende's delivery in Chicago. In Chicago Petrossi's men would determine the quality, after which Petrossi would pay Figueroa in New York. In this way neither Petrossi nor Figueroa would have to touch the narcotics. (R. 25-26)

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[1] "(R. —)" references apply to pages in the stenographer's minutes.

Thereafter Figueroa, Chacon and Josende conversed again in Spanish, after which Josende inquired about the quantity of narcotics the agent wanted to purchase. Petrossi responded one kilogram of heroin, stating that he only wanted to pay for one-half. Chacon stated that he would obtain the narcotics from Figueroa and transfer them to Josende, who in turn would deliver them at the agent's hotel.

Petrossi asked for a telephone number where Figueroa could be contacted and was told by Figueroa that Josende would give it to him at the time the drugs were delivered, later that day. Petrossi asked whether there was pure cocaine available, and Chacon, after conversing with Figueroa in Spanish, stated that quality cocaine was not available but they expected that a supply would be forthcoming. (R. 13)

Thereafter Figueroa drove back to the area of 163rd Street and Broadway in New York City, where Petrossi exited the vehicle.

At approximately 5:45 p.m. that same day Josende delivered 495.7 grams of heroin (54.9%) (Ex. 2), a narcotic drug, (R. 162-165) to the agents in return for $13,500.

On March 25, 1970, Agents Petrossi and Fullett again traveled from Chicago and secured a room in Manhattan, New York. They met with Josende on Broadway at 163rd Street, New York City. The three men then proceeded to a nearby bar where they met with Figueroa. Petrossi, in the presence of Fullett and Josende, conversed with Figueroa in English about Figueroa's health and the poor quality of the heroin previously purchased on February 19 by Petrossi, (R. 37-38), and also Petrossi's continued

interest in purchasing heroin and cocaine. (R. 37-39) Petrossi again told Figueroa that he only wanted to pay for one-half of the drugs and asked how much he could buy. Figueroa signaled with his hands and simultaneously stated to Josende "one and one." (R. 39)

The negotiations were interrupted by the arrival at the bar of a woman known to Figueroa but unknown to the agents. Figueroa told the others in English to meet him at a nearby restaurant. Josende and the agents went by taxi to the restaurant, ordered dinner, and were joined shortly thereafter by Figueroa. (R. 40) Figueroa asked Petrossi, in English, how much money he had. (R. 41) Petrossi replied "$14,000" and stated he wanted to buy one-half kilogram each of cocaine and heroin, on the partial-deferred payment basis previously proposed. Figueroa inscribed figures on a napkin (Ex. 1), referring to the price of the requested narcotics. 13,500 indicated the price of the heroin and 7,000 indicated the price of the cocaine. Figueroa added these figures to arrive at a total price of $20,500, which he inscribed. Petrossi then took the napkin and on it wrote 10,000 with a dollar sign in front of it. Petrossi handed the napkin back to Figueroa who said "O.K." (R. 43) Figueroa then left the restaurant, returning twice, commenting that he was experiencing difficulty locating "his man." He told the agents to wait for him at Josende's apartment. (R. 46)

Petrossi, Josende and Fullett returned to Josende's apartment at 163rd Street and Broadway where they met Chacon and one Emilio Del Gado. Thereafter Fullett and Del Gado left Josende's apartment and went to the agents' motel room. Josende, Chacon and Petrossi remained in the

apartment. When Figueroa arrived they entered the bathroom of the apartment where conversations in Spanish and English took place. Figueroa said to Petrossi, in English, that he would deliver the drugs to Chacon, Chacon would deliver the drugs to Josende, and Josende would deliver them to Petrossi. (R. 49) Then Petrossi and Josende went to the motel; thereafter Josende and Del Gado departed, leaving the agents there alone. At about 8:30 p.m. Josende delivered 558.6 grams of heroin (31.89%), and 502.8 grams of cocaine, (21.3%) narcotic drugs (R. 162-165) for which Fullett paid $10,000. (R. 52-53; Ex. 3 and 4)

At no time on either February 19 or March 25, 1970, did anyone, including Figueroa, request of the agents an order form prepared by the Secretary of the Treasury. (R. 54)

Throughout the trial the defense contended that Figueroa could not speak or understand English, or, at the very best his command and understanding of English was minimal. Mr. Figueroa sought to support this contention by his own testimony, through an interpreter. In addition, witnesses called on his behalf testified that in their interactions with Figueroa he always conversed in Spanish.

The government proved that Mr. Rodney J. Walker, Senior Examiner of the Department of Highway Safety and Motor Vehicles, State of Florida, interviewed an individual, on or about December 30, 1969, in connection with the latter's application for the substitution of a Florida chauffeur's license for a standard Florida operator's license. Applicants, who on December 30, 1969, were unable to speak English, were entitled to be interviewed and assisted by Spanish speaking employees of the Motor Vehicle Department. Such persons were available for that purpose

at that time. Mr. Walker does not speak Spanish. He interviewed a Mr. Figueroa who was asked and affirmatively responded that he read, wrote and spoke English.

Mr. Walker did not have an independent recollection of the defendant at the time of trial. He testified that the individual whom he interviewed signed the name "Cirilio Figueroa" to his application in Walker's presence. This application bears the number "K 15771" as well as the signature "Cirilio Figueroa." (Ex. 6A) Defendant presently has issued to him a Florida chauffeur's license bearing the identical identification number, and a signature bearing the name Cirilio Figueroa. (Ex. 5A) This license was issued on December 30, 1969. The defendant admitted on cross-examination that he changed his Florida operator's license to a chauffeur's license at about that time. (R. 211-13)

Agent John O'Neill also interviewed the defendant pursuant to a post-arrest conversation, in English, and was able to obtain information regarding the defendant's pedigree.

The government's burden of persuasion with respect to the two violations of Title 21, U.S.C. Secs. 173, 174, required it to prove the following elements:

1. That defendant wilfully and knowingly received or concealed or facilitated the transportation or concealment of a narcotic drug;

2. that the drug had been imported or brought into the United States contrary to law;

3. that defendant knew of the unlawful importation.

The elements involved in the conviction of defendant for the two counts of Title 26, Section 4705(a), U.S.C. are as follows:

1. that defendant sold or bartered or exchanged or gave away a narcotic drug;

2. not in pursuance of a written order on a form issued by the Secretary of the Treasury;

3. that defendant wilfully, knowingly, and unlawfully committed said acts.

The government offered no direct proof that the heroin involved in Counts 1 and 3 was illegally imported and that defendant knew this fact. Instead, it chose to rely upon the "permissible inferences" contained in Section 174(b) of Title 21 U.S.C.[2]

Although the utilization of such inferences has been recently judicially circumscribed in cases involving cocaine, the law permits the trier of fact to employ the inference of importation and knowledge thereof when—as here—the substance involved is heroin.

The operation of these inferences is permissible. The trier of fact may, if it so chooses, reject this legislatively found "fact" or utilize it in its deliberations. Section 174 does not operate as a substitute for the fact finder's duty to be convinced beyond a reasonable doubt that the ultimate facts are true before it can convict. *United States* v. *Crespo*, 422 F. 2d 718, 720 (2d Cir. 1970).

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[2] "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." Title 21, §174.

The operation of the inference is dependent upon the Government's proof beyond a reasonable doubt that the defendant had either actual or constructive possession of heroin.

The government contended that Figueroa had constructive possession of the narcotics sold to Agent Petrossi; the defendant assailed this position.

An individual is said to have constructive possession although he has no contact with a thing if he has both the power and the intention to exercise dominion over it, either directly or through another person. *United States* v. *Hernandez*, 290 F.2d 86, 90 (2d Cir. 1961); *United States* v. *Jones*, 308 F.2d 26, 30 (2d Cir. 1962) (en banc). It is insufficient for the government to establish that the defendant had knowledge of the physical location of the contraband or the defendant's mere presence in the vicinity of it. *United States* v. *Hamilton*, 420 F.2d 1096, 1098 (2d Cir. 1970).

The government proved that of the three persons involved in the two transactions alleged in counts 1 and 3, Figueroa played the dominant and supervisory role, directing the execution of each drug sale through the employment of his lieutenants Chacon and Josende. It is well established that physical control by an employee or agent whom one dominates, or whose actions one can control, is sufficient to constitute constructive possession. *Hernandez*, *supra*, at 90; *United States* v. *Rosario*, 327 F.2d 561, 563 (2d Cir. 1964); *United States* v. *Robinson*, 354 F.2d 109, 114 (2d Cir. 1965) (en banc); *United States* v. *Hernandez*, 441 F.2d 157, 164 (5th Cir. 1971).

Defendant asserts the "possibility" that Josende was the "real seller" and that the latter devised the delivery system with Chacon, without Figueroa's involvement. To the contrary, the evidence demonstrated that Figueroa's presence, participation, and ultimate approval was a condition to the consummation of each narcotic sale.

It is clear that Josende played the menial role of courier and Chacon of intermediary. Josende made the introduction, procured Chacon and delivered the drugs. Chacon himself disclosed his role when he told Petrossi, in the presence of Figueroa, that he would obtain the narcotics from Figueroa, and transfer them to Josende, who would make the ultimate delivery. *See United States* v. *Campisi*, 248 F.2d 102, 106 (2d Cir.), *cert. denied* 355 U.S. 992 (1957); *United States* v. *Santos*, 372 F.2d 177, 180 (2d Cir. 1967).

Lastly, Figueroa urges that his circumstances parallel those of the defendant Hysohion in the recently decided case of *United States* v. *Hysohion, Roupinian and Rimbaud*, Dockets 34818, 34828, 34829, (2d Cir. August 23, 1971), wherein the Court held that constructive possession was not sufficiently established.

The facts herein are distinguishable since Hysohion's ability to assure delivery was negated by (1) his incarceration in prison at the time of the sale, (2) the fact that the actual transfer did not occur as schedule but occurred two months later, and (3) the "very real" possibility that the delivery system was devised without the supervision of Hysohion. The court in *Hysohion* noted, at 4765, quoting Jones, that a defendant lacks constructive possession if he acts merely as a "casual facilitator" introducing two interested persons bent upon a sale. The case at bar is fac-

tually inapposite because the government succeeded in proving that Figueroa was the principal "peddler" and not the "go-between."

With respect to counts 2 and 4 which concern violations of the order form requirements, contrary to the defendant's assertion, it was not incumbent upon the government to prove illegal importation or knowledge thereof to support a conviction. *United States* v. *Beverhoudt*, 438 F.2d 930, 931 n. 1 (2d Cir. 1971); *Yearwood* v. *United States*, 294 F.Supp. 748, 749 (S.D.N.Y. 1969).

Moreover, since Figueroa was charged as an aider and abetter of a transfer without a proper order form, it was unnecessary for the government to prove that the defendant, himself, physically transferred the narcotics, *United States* v. *Jiminez*, Dkt. No. 35547, (2d Cir. June 11, 1971) nor even that he was present at the time the actual delivery occurred. *United States* v. *Morris*, 269 F.2d 100, 102 (2d Cir.), *cert. denied*, 361 U.S. 885 (1959); *United States* v. *Joaquin Prada*, Dkt. No. 71-1528, (2d Cir. Nov. 30, 1971); *United States* v. *Gray*, 271 F.Supp. 649, 650 (E.D. Mo. 1967), *aff'd sub nom. Smith* v. *United States; Gray* v. *United States*, 391 F.2d 605 (8th Cir. 1968). (*See, also, United States* v. *Priest*, 419 F.2d 570 (10th Cir. 1970), for a parallel decision regarding conviction for aiding and abetting the transfer of marijuana not pursuant to a written order form.)

Upon the foregoing, which constitutes this court's Findings of Fact and Conclusions of Law,[3] it is determined that the United States has proved beyond a reasonable doubt

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[3] (Footnote illegible)

the essential elements regarding all four counts. The defendant is adjudged guilty on all four counts.

/s/ DAVID EDELSTEIN
Ch. J., U.S.D.J.

Dated: New York, N. Y.
December 23, 1971.

APPENDIX B

Memorandum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Cr. 1167 D.N.E.

UNITED STATES OF AMERICA,

—against—

CIRILIO FIGUEROA,

Defendant.

EDELSTEIN, *D.J. Ch.*

Defendant moves, pursuant to Rule 34, Fed. Rules Crim. P. to arrest judgment based upon the contention that "the court lacks jurisdiction to find the defendant guilty" in that:

(1) allegedly contrary to Rule 43, the defendant was not present at the time the verdict was "entered," and

(2) a "general" finding of guilty was filed over sixty days from the close of all evidence, allegedly contrary to Rule 23, Fed. R. Crim. P.

Defendant's contentions shall be considered *seriatim*.

Initially, it should be stated that defendant's use of a Rule 34 motion as a vehicle to challenge various alleged procedural infirmities is both untimely and substantively inappropriate. A Rule 34 motion must be filed within seven

days after a determination of guilt. This time constraint is "mandatory and jurisdictional." See 8A Moore ¶34.02. Rule 45(b) expressly provides that the court may not enlarge this period for any reason. Moreover, defendant's motion is substantively defective in that the jurisdiction referred to in Rule 34 concerns subject matter jurisdiction rather than the procedural improprieties which are alleged herein.

This fatal defect aside, the court finds, nevertheless, Figueroa's procedural challenges untenable. First, Figueroa contends that Rule 43, Fed. R. Crim. P. commands his presence in open court upon the rendering of a verdict. By a somewhat tortuous reference to Rule 34, the defendant insists that judgment must be arrested and the verdict deemed a nullity since the verdict filed on December 27, 1971, was not read to him.

Although the language of Rule 43 does not distinguish between jury and non-jury trials, it appears from the context of its language that the mandate requiring a defendant's presence at the time a verdict is rendered is predicated upon enabling the defendant to poll the jury. See 8A Moore, 43.03 n. 13. See also Rule 31(d) Fed. Rules Crim. P. In the context of a non-jury trial, then, it appears that Rule 43 is primarily of ceremonial value.

Lastly, the defendant reads Rule 23(c) to forbid the court from entering findings of fact and conclusions of law without his request. To the contrary, the language of Rule 23(c) does not preclude a *sua sponte* request for proposed findings of fact and conclusions of law. There is ample authority for this approach. *See United States* v. *Belville,* 82 F.Supp. 650 (1949); *United States* v. *Ginzburg,* 338 F.2d

12, 16 (1964),[1] as well as 8 Moore ¶ 23.05 n. 7. It is noteworthy that as in *Ginzburg,* counsel for defendant at no time objected to this court's request for proposed findings of fact and conclusions of law.

Defendant, it would appear, also assails entry of judgment on the ground that he was denied due process of law because a period of approximately sixty days elapsed from the close of the case to the filing of a general finding of guilt. This time span is claimed to be unreasonable. The defendant's argument is spurious. Although the court was convinced of the defendant's guilt beyond a reasonable doubt shortly after the close of the case, it withheld pronouncing its verdict because it was thought that findings of fact and conclusions of law might prove to be helpful in the event of an appeal.

The documenting of the factual and legal basis of defendant's guilt seemed clearly to be in the interests of both the government and the defendant. Accordingly the court proceeded as expeditiously as it could to perform this time consuming task.

Nor is the reference to the Second Circuit's rules mandating the prompt disposition of criminal cases pertinent. *See Second Circuit Rules Regarding Prompt Disposition of Criminal Cases,* as amended May 24, 1971.

The court reemphasizes that counsel for defendant was well aware that findings of fact and conclusions of law would be filed in this case. No objection was made. In addition, at no time after the close of trial did defense counsel request the court to announce a verdict. Moreover,

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[1] This case was cited by the defendant on a related but different point of law.

the defendant was enlarged on bail during the post-trial period here in issue until the date of sentencing.

The defendant suffered no prejudice as a result of the lapse of time.

The motion is denied in all respects.

/s/ DAVID N. EDELSTEIN
Chief Judge, U.S.D.C.

Dated: New York, N.Y.
January 26, 1972

APPENDIX C

Judgment and Commitment

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 71 Cr. 1167

UNITED STATES OF AMERICA

v.

CIRILIO FIGUEROA

On this 24th day of January, 1972 came the attorney for the government and the defendant appeared in person and by Joseph Stone, Esq.,

IT IS ADJUDGED that the defendant upon his plea of not guilty as to each of the four counts charged in the indictment and a finding of guilty on each of said counts by the Court, defendant having waived trial by jury, has been convicted of the offenses of unlawfully, wilfully and knowingly receiving, concealing, and facilitating the transportation and concealment of heroin after the said narcotic drug had been imported and brought into the U. S. contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the U. S. contrary to law. (Title 21, U.S. Code, Sections 173 and 174.); (Title 18, U.S. Code, Section 2.); unlawfully, wilfully and knowingly selling, bartering, exchanging and giving away heroin and co-

caine, narcotic drugs, not in pursuance of a written order of the Secretary of the Treasury of the U. S., or his delegate. (Title 26, U.S. Code, Sections 4705(a) and 7237(b) (Title 18, U.S. Code, Section 2.) as charged in counts 1 thru 4, inclusive and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of the mandatory minimum of FIVE (5) YEARS on each and every count, to wit counts 1, 2, 3 and 4, to run concurrently.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ DAVID N. EDELSTEIN,
United States District Judge

/s/ JOHN LIVINGSTON,
Clerk

APPENDIX D

Order of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eight day of February one thousand nine hundred and seventy-two.

Present:

HON. HENRY J. FRIENDLY,
Chief Judge

HON. IRVING R. KAUFMAN,
HON. JAMES L. OAKES,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CIRILO FIGUEROA,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix D—Order of Affirmance

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX E

Information

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Cr. 1167

UNITED STATES OF AMERICA,

-v-

CIRILIO FIGUEROA,

Defendant.

The United States Attorney charges:

On or about the 19th day of February, 1970, in the Southern District of New York, CIRILIO FIGUEROA, the defendant, unlawfully, wilfully and knowingly did receive, conceal and facilitate the transportation and concealment of a narcotic drug; to wit, approximately 500 grams net weight of heroin after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Director of the Bureau of Narcotics and Dangerous Drugs may find necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, United States Code, Sections 173 and 174)
(Title 18, United States Code, Section 2)

Appendix E—Information

THIRD COUNT

The United States Attorney further charges:

On or about the 25th day of March, 1970, in the Southern District of New York, CIRILIO FIGUEROA, the defendant, unlawfully, wilfully and knowingly did receive, conceal and facilitate the transportation and concealment of a narcotic drug, to wit, approximately 500 grams net weight of heroin after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Director of the Bureau of Narcotics and Dangerous Drugs may find necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, United States Code, Sections 173 and 174 and (Title 18, United States, Code, Section 2)

FOURTH COUNT

The United States Attorney further charges:

On or about the 25th day of March, 1970, in the Southern District of New York, CIRILIO FIGUEROA, the defendant, unlawfully, wilfully and knowingly did sell, barter, exchange and give away to Dominic P. Petrossi approximately 500 grams net weight of cocaine a narcotic drug, in that the said sale, barter, exchange and giving away was not in pursuance of a written order of the said Dominic P. Pe-

trossi on a form issued in blank for that purpose by the Secretary of the Treasury of the United States or his delegate.

(Title 26, Sections 4705(a) and 7237(b), United States Code, Title 18 United States Code, Section 2)

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

APPENDIX F

Notice of Appeal to the United States Court of Appeals

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

71 Cr. 1167

UNITED STATES OF AMERICA,

—v.—

CIRILO FIGUEROA,

Defendant.

Name and address of appellant: Cirilo Figueroa, 1601 University Avenue, Bronx, New York.

Name and address of appellant's attorney: Joseph I. Stone, Esq., 277 Broadway, New York, New York 10007.

Offense: Violation of Title 21, Sections 173 and 174, U.S.C.

Judgment: Rendered on 1/24/72 before Honorable David N. Edelstein, U.S.D.J., sentencing the defendant to Five (5) years.

Bail: Denied.

The above-named appellant hereby appeals to the United States Court of Appeals for the Second Circuit from the above-stated judgment.

Dated: New York, New York
January 25, 1972

Appendix F—Notice of Appeal to the United States Court of Appeals

/s/ Joseph I. Stone
Joseph I. Stone, Esq.
Attorney for Defendant
Office & P.O. Address
277 Broadway
New York, New York 10007

To:

Whitney North Seymour, Jr., Esq.
United States Attorney
Southern District of New York
U.S. Courthouse
Foley Square, New York, New York

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1210

CIRILO FIGUEROA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a non-jury trial in the United States District Court for the Southern District of New York, petitioner was found guilty on four counts charging violations of the federal narcotics laws (21 U.S.C. (1964 ed.) 173, 174; 26 U.S.C. (1964 ed.) 4705 (a), 7237(b)) (Pet. App. A1-A12). He was sentenced to concurrent five-year terms of imprisonment (Pet. App. A17-A18). Petitioner's motion to arrest judgment was denied (Pet. App. A13-A16), and the court of ap-

peals affirmed the conviction without opinion (Pet. App. A19-A20).

The evidence, which is summarized at some length in the district court's opinion (Pet. App. A1-A7), revealed that an undercover agent of the Bureau of Narcotics and Dangerous Drugs, Dominic Petrossi, was introduced to petitioner by Jose Josende and Manuel Chacon in New York City in February 1970. Petrossi told petitioner that the narcotics which he had purchased from Josende in Chicago had not been of satisfactory quality and that he had asked to contact the source of Josende's drugs so that the source could guarantee the quality of the drugs. The agent proposed paying one-half of the price in advance of delivery in Chicago and paying the remainder to petitioner in New York after delivery. In response to a question by Josende, Petrossi said that he wanted one kilogram of heroin. Chacon said that he would obtain the narcotics from petitioner and give them to Josende, who would deliver them at the agent's hotel. Later, Josende delivered 495.7 grams of heroin.

In March 1970, Petrossi, this time with another agent, again met petitioner in New York. After petitioner asked the agent how much money he had, Petrossi replied "$14,000." He said that he wanted to buy one-half kilogram each of heroin and cocaine, on the payment basis previously proposed. Petitioner then wrote on a napkin the figures "13,500," indicating the price of the heroin, and "7,000," indicating the price of the cocaine. Petrossi took the napkin, wrote "$10,000" on it, and returned it to

petitioner, who said "O. K." Subsequently, petitioner told Petrossi that he would deliver the narcotics to Chacon, Chacon would deliver them to Josende, and Josende would deliver them to Petrossi. Later that evening, Josende delivered to Petrossi 558.6 grams of heroin and 502.8 grams of cocaine.

1. Most of petitioner's claims—*i.e.*, that the evidence was insufficient to establish that he had possessed the heroin; that, contrary to Rule 23(c), Fed. R. Crim. P., the trial court erroneously entered findings of fact and conclusions of law without petitioner's request; that Rule 43, Fed. R. Crim. P., was violated since he was not present when the verdict was rendered (*i.e.*, filed) on December 27, 1971; and that the delay of approximately sixty days from the close of the case to the filing of the general finding of guilt was violative of his rights—were carefully considered and correctly rejected by the district court in its opinion (Pet. App. A1-A12) and in its memorandum denying petitioner's motion to arrest judgment (Pet. App. A13-A16).

2. Petitioner's other contentions are also without merit. He has failed to substantiate his claim that there was an unreasonable delay between his arrest and arraignment which prejudiced his right to a fair trial. Petitioner was arrested on June 22, 1970, in the Southern District of New York on the basis of a warrant issued in the Northern District of Illinois. After several adjournments, consented to by petitioner, a hearing was held on August 5, 1970, before a United States commissioner in the Southern District

of New York. After the government had shown that petitioner was in fact the person named in the warrant, removal to the Northern District of Illinois was ordered.[1] Subsequently, at petitioner's request, the case was transferred back to the Southern District of New York pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure and was received there around December 8, 1970. On May 3, 1971, petitioner entered a plea of not guilty and the case was assigned to a judge. Trial commenced on October 13, 1971.

The period between arrest on June 22, 1970, and the return of the case to the Southern District of New York on December 8, 1970, was largely the consequence of adjournments prior to transfer to which petitioner consented and of the processing of his own request to have the case returned to New York. With respect to the remaining ten months prior to trial, including the five month delay before arraignment in New York,[2] petitioner has not shown that the delay was purposeful on the part of the government or that he was prejudiced. While co-defendant Chacon[3] disappeared prior to petitioner's arraignment in May 1971, there is no showing that he was available at any time after the case was transferred to New York. Moreover, there is no indication that Chacon would

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[1] Petitioner was free on bond at all times prior to conviction.

[2] Petitioner had previously been arraigned in the Northern District of Illinois and had pleaded not guilty.

[3] Chacon was arrested with petitioner in New York and his case was ordered removed to Illinois. Subsequently, his case was also transferred to New York for trial.

have waived his Fifth Amendment privilege against self-incrimination and offered testimony beneficial to petitioner. Under these circumstances, petitioner has failed to sustain his claim of a violation of his right to a speedy trial.[4] *United States* v. *Ewell*, 383 U.S. 116; *United States ex rel. Solomon* v. *Mancusi*, 412 F. 2d 88 (C.A. 2).[5]

3. Effective May 1, 1971 (prior to petitioner's conviction), the statutes under which petitioner was convicted and which provided for a five-year mandatory minimum prison term were repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970. P.L. 91-513, Sections 1101(a) (2), 1101(b) (3) (A), 1101(b) (4) (A), 1105(a), 84 Stat. 1291-1292, 1295.

At sentencing on January 24, 1972, petitioner, relying upon the Ninth Circuit's decision in *United States* v. *Stephens*, 449 F. 2d 103, requested that the court consider imposing less than the five-year mandatory

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[4] Petitioner also seemingly suggests that the alleged delay here was prejudicial to him in that he was unable to remember the events of the day on which it was said that he wrote the figures on the napkin. Thus, he asserts that he was surprised by the introduction of the napkin into evidence as an exhibit and was unable to find witnesses in his behalf to indicate whether or not he was in the restaurant or whether or not he wrote on the napkin. This contention is without merit, since the original indictment, filed in June 1970, put petitioner on notice that it might be necessary to account for his activities on the day in question.

[5] The case of *Ross* v. *United States*, 349 F. 2d 210 (C.A. D.C.), cited by petitioner, is not in point, as that case dealt with pre-arrest delay.

minimum term. The court refused to do so and imposed the mandatory minimum term on each count. Petitioner now asks this court to resolve an asserted conflict between *Stephens* and the decision of the Second Circuit in *United States* v. *Fiotto*, 454 F. 2d 252, pending on petition for a writ of certiorari, No. 71-1114, and, implicitly, the decision of the court of appeals here.

As we have previously discussed in other briefs, there is no conflict between *Stephens* and those cases upholding the imposition of the five-year minimum mandatory term upon those sentenced after May 1, 1971. See, *e.g.*, our briefs in opposition in *Robert Wollack, Jr.*, v. *United States*, No. 71-992, O.T. 1971, and *Stanley Wooden* v. *United States*, No. 71-6085, O.T. 1971.* *Stephens* held that the repeal of 26 U.S.C. (1964 ed.) 7237(d), which prohibited the granting of probation or of suspended sentences in certain cases involving violations of the narcotics laws, permitted suspension of the sentence there and the release of the defendant on probation—an issue not present in this case.

It is our position, as fully set forth in our brief in *Wollack*, that irrespective of the date of sentencing, the sentencing provisions of 21 U.S.C. (1964 ed.) 174 and 26 U.S.C. (1964 ed.) 7237(b) remain in force by virtue of the specific savings clause of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513, Section 1103(a), 84 Stat.

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* We are supplying petitioner with a copy of each of these briefs.

1294), as well as the general federal savings statute (1 U.S.C. 109), for narcotics violations occurring prior to May 1, 1971.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

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